Syarikat Perjalanan Terus Sabak Bernam-Kuala Lumpur Sdn Bhd v Mahkamah Perusahaan Malaysia & Anor

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R2–25–56 OF 2002
WAN AFRAH JC
20 JANUARY 2004

Labour Law — Industrial Court — Procedure — Variation of award — Form to be used — Whether Form M proper when invoking jurisdiction of Industrial Court to exercise its interpretation function — Industrial Relations Act 1967 s 33(1), (2)

Labour Law — Industrial Court — Finding of fact — Interpretation of collective agreement — Whether Industrial Court can make a finding of fact based on disputed facts at interpretation stage under s 33(1) Industrial Relations Act 1967

Labour Law — Industrial Court — Jurisdiction — Power of High Court to interfere with finding of fact of Industrial Court — Whether High Court has power in certiorari proceedings to interfere with finding of facts by Industrial Court

The appellant and the second respondent ('the union') had entered into a collective agreement ('the agreement') in which Mohamad Kassim bin Sheikh Adam ('the employee') was an employee of the former and a union member of the latter. The employee, a bus driver was required vide a term of his contract of employment, to renew and possess a valid Public Services Vehicle Licence ('PSVL') at all times. The employee refused to renew the PSVL when it expired and when compelled by the appellant to produce the renewed PSVL, he tendered his resignation to be with immediate effect and thereafter claimed for retirement benefits under cl 15 of the agreement. The appellant however, refused to pay the retirement benefits because the employee had resigned and not retired. The employee, through the second respondent, filed an application in the Industrial Court ('first respondent') for non-compliance of the agreement ('first application') and subsequently made another application for interpretation of the collective agreement under s 33(1) of the Industrial Relations Act 1967 ('the Act') ('second application'). They also applied for the hearing of the first application to be held in abeyance until the disposal of the second application. The first respondent heard the second application and found in favour of the employee. The court held that pursuant to the agreement, the employee was entitled to optional retirement benefits after attaining the age of 45, the employee had exercised his option to retire and therefore he did not resign from the company. Against the decision of the first respondent, the appellant applied to the High Court to review the decision on the ground that the first respondent erred in arriving at its decision and acted outside its jurisdiction. It was contended by the appellant that at the interpretation stage under s 33(1) of the Act, the first respondent had gone into question of fact to determine among others, if the employee had exercised his option to retire or resign as this issue would only be relevant in determining if there had been non-compliance of the award under s 56(1) of the Act.

Held:

Section 33 is indeed specific. Its purpose is to interpret and nothing more. It does not entail making a finding of fact based on disputed facts. Where the Industrial Court goes into the question of fact to determine if the employee had exercised his option to retire or resign, this would tantamount to the Industrial Court's dwelling to determine whether there has been non-compliance of the award. In other words, the Industrial Court had no jurisdiction under s 33(1) of the Act to decide whether the letter was in effect a letter exercising his option to retire and not a letter of resignation. The first respondent had therefore, encroached into the bounds of non-compliance under s 56(1) of the Act which relates to non-compliance of any term of the agreement. The Industrial Court had also committed an error of law when it held that the employee at the time he tendered in his resignation letter, he was 54 years and 11 months when in actual fact he was only 53 years and 11 months. The Industrial Court had indeed erred in arriving at its decision and acted outside jurisdiction, and it therefore follows that there was an error of law, which required interference of the High Court (see paras 20–22, 34, 38).

[**Bahasa Malaysia summary**

Perayu dan responden kedua ('persatuan tersebut') telah memasuki satu perjanjian kolektif ('perjanjian tersebut') di mana Mohamad Kassim bin Sheikh Adam ('pekerja tersebut') merupakan pekerja perayu dan ahli persatuan responden kedua. Pekerja tersebut, seorang pemandu bas telah dikehendaki melalui satu terma kontrak pekerjaan beliau, memperbaharui dan memiliki Lesen Kenderaan Khidmat Awam yang sah ('LKKA') pada setiap masa. Pekerja tersebut enggan memperbaharui LKKA tersebut apabila ia telah luput dan apabila diminta oleh perayu untuk mengemukakan LKKA yang diperbaharui, beliau telah menenderkan pemberhentian kerja beliau yang dengan serta merta berkuatkuasa dan selepas itu menuntuk faedah persaraandi bawah kl 15 perjanjian tersebut. Perayu bagaimanapun, enggan membayar faedah persaraan tersebut kerana pekerja tersebut telah berhenti kerja dan tidak bersara. Pekerja tersebut, melalui responden kedua, telah memfailkan satu permohonan di Mahkamah Perusahaan ('responden pertama') untuk ketidakpatuhan perjanjian tersebut ('permohonan pertama') dan kemudiannya membuat satu permohonan lain untuk tafsiran perjanjian kolektif tersebutdi bawah s 33(1) Akta Perhubungan Perusahaan 1967 ('Akta tersebut') ('permohonan kedua'). Mereka juga memohon untuk perbicaraan permohonan pertama dibiarkan begitu sahaja sehingga selesai permohonan kedua. Responden kedua telah mendengar permohonan kedua tersebut dan berpihak kepada pekerja. Mahkamah memutuskan bahawa menurut perjanjian, pekerja tersebut berhak kepada pilihan faedah persaraan selepas mencecah umur 45 tahun, pekerja tersebut telah melaksanakan pilihan tersebut untuk bersara dan oleh itu tidak berhenti kerja dari syarikat tersebut. Terhadap keputusan responden pertama, perayu telah memohon ke Mahkamah Tinggi untuk mengkaji semula keputusan tersebut atas alasan bahawa responden pertama telah membuat kesilapan dalam keputusannya dan bertindak di luar bidang kuasanya. Ia dihujahkan oleh perayu bahawa di peringkat penafsiran di bawah

s 33(1) Akta tersebut, responden pertama telah mengutarakan persoalan fakta untuk menentukan antara lain, jika pekerja tersebut telah menggunakan pilihan beliau untuk bersara atau berhenti kerja kerana persoalan ini hanya menjadi relevan dalam menentukan jika terdapat ketidakpatuhan award di bawah s 56(1) Akta tersebut.

Diputuskan:

Seksyen 33 sememangnya spesifik. Tujuannya adalah untuk menafsir dan tidak lebih daripada itu. Ia bukan bertujuan untuk membuat penemuan fakta berdasarkan fakta-fakta yang dipertikaikan. Di mana Mahkamah Perusahaan mengutarakan persoalan fakta untuk menentukan jika pekerja tersebut telah menggunakan pilihan beliau untuk bersara atau berhenti kerja, ini sama seperti urusan Mahkamah Perusahaan untuk menentukan sama ada terdapat ketidakpatuhan award. Dalam erti kata lain, Mahkamah Perusahaan tiada bidang kuasa di bawah s 33(1) Akta terebut untuk memutuskan sama ada surat tersebut berkuatkuasa seperti surat menggunakan pilihan beliau untuk bersara dan bukan surat berhenti kerja. Responden pertama oleh itu telah, menceroboh had ketidakpatuhan di bawah s 56(1) Akta tersebut yang berkaitan ketidakpatuhan apa-apa terma perjanjian tersebut. Mahkamah Perusahaan juga telah melakukan satu kesilapan undang-undang apabila ia memutuskan bahawa pada masa pekerja tersebut mengemukakan surat berhenti kerja beliau, beliau berumur 54 tahun dan 11 bulan walhal beliau hanya berumur 53 tahun dan 11 bulan. Mahkamah Perusahaan sememangnya tersilap dalam keputusannya dan bertindak di luar bidang kuasa, dan oleh itu terdapat kesilapan undang-undang, yang memerlukan campur tangan Mahkamah Tinggi (lihat perenggan-perenggan 20–22, 34, 38).]

Notes

For cases on collective agreements, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 787–789.

For cases on finding of facts by Industrial Court, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 1318.

For cases on jurisdiction of Industrial Court, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1323–1375.

Cases referred to

Colgate Palmolive (M) Sdn Bhd v Yap Kok Foong and another appeal [2001] 4 MLJ 97 (refd)

Guardian Royal Exchange Assurance (M) Bhd v National Union of Commercial Workers & Anor [2000] 7 MLJ 503 (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd)

Scrutiny Printers (M) Sdn Bhd v Printing Industry Employees Union [1977] 3 CLJ 538 (refd)

Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317 (refd)

Legislation referred to

Employment Act 1955 s 13(2)
Industrial Court Rules 1967 rr 14, 15
Industrial Relations Act 1967 ss 31(1), 33(1), 56(1), (2)
Rules of the High Court 1980 O 53

PG Jayendran (T Siva & Co) for the applicant.
Marina Netto (Christy Marina & Assoc) for the second respondent.

Wan Afrah JC:

[1] This is an application to quash the Industrial Court Award No 305 Year 2002 dated 10 April 2002 pursuant to the provision of O 53 of the Rules of the High Court 1980. The applicant's motion is supported by the statement setting out the grounds on which the applicant relies and also the affidavit of Teh Boon Keng affirmed on 16 May 2002.

[2] The material facts giving rise to the application may be summarized as follows.

[3] The Transport Workers Union Peninsular Malaysia ('the second respondent') and Syarikat Perjalanan Terus Sabak Bernam-Kuala Lumpur Sdn Bhd ('the company') had entered into a collective agreement on 2January 1996. Mohamad Kassim bin Sheikh Adam ('the employee') was an employee of the company and a member of the second respondent.

[4] The employee was working as a bus driver of the company. It was a term of the contract of employment between the company and the employee that the employee has to renew and possess a valid Public Service Vehicle Licence ('PSVL') at all times. The employee refused to renew the PSVL when it expired on 24 April 2000.

[5] When the company compelled the employee to produce his renewed PSVL the employee tendered his resignation and claimed for retirement benefits under cl 15 of the collective agreement.

[6] As the employee had tendered his resignation to the company, the Company did not pay any retirement benefits to the employee.

[7] Hence, the employee through the union (second respondent) filed an application for non-compliance of the cl 15 of the collective agreement ('the first applicant') at the Industrial Court.

[8] The second respondent subsequently filed an application for interpretation ('the second application') of the collective agreement and applied for the hearing of the first application to be held in abeyance until the disposal of the second application,

[9] In the second application, the second respondent representing the employee applied for interpretation of cl 15 of the collective agreement under s 33(1) of the Industrial Relations Act 1967 ('the IRA') using form M together with Appendix A attached with form M. The second respondent

had in their prayers in Appendix A also prayed for variation of cl 15 of the collective agreement under s 33 (2) of the IRA.

[10] After the hearing of the application, the Industrial Court held that the employee was entitled to optional retirement benefits after attaining the age of 45 years old, the employee had exercised his option to retire and therefore he did not resign from the company. It was also stated by the defence counsel for the company that at this interpretation stage the Industrial Court held that the company did not comply with the collective that is non-compliance of the collective agreement.

[11] Basically, there were five issues raised by the applicant company.

GROUND 1

Can the Industrial Court at the interpretation stage under s 33(1) of the IRA determine and decide that there is a non-compliance with the terms of the collective agreement as in the above case

[12] The learned defence counsel for the company argued orally before me and in his written submission that in the award the Industrial Court held at p 5 of the award, 'that this court agrees with the union submission that cl 15 of the agreement means an employee may go on optional retirement after attaining the age of 45 years'. That is not the end of that matter. There is a second question. Had Mohamad Kassim exercised his option to retire or did he resign from the service of the company? Therefore, the answer to the question whether the employee is entitled to the retirement benefits is 'yes'.

[13] It was submitted before me that from the passage above it was clear that the first point of the award deals with the interpretation of the collective agreement under s 31(1) of the IRA. However, the second part deals with the non-compliance of the collective agreement. This is clear from the award itself where the court goes into question of fact to determine if Mohamad Kassim had exercised his option to retire or resign as this issue will only be relevant in determining if there has been non-compliance of the award.

[14] It was submitted that the Industrial Court Chairman exceeded his jurisdiction when, at the interpretation stage under s 33(1) of the IRA, he went on to consider whether there was non-compliance of the collective agreement under s 56(1) of the IRA.

[15] This is because there is already an application pending before the same Industrial Court for a hearing of non-compliance, which has not been heard and also because the court has no jurisdiction under s 33(1) to hear a matter of non-compliance, which comes under s 56(1) of the IRA.

[16] Counsel for the respondent on the other hand argued that s 33(1) of the IRA gives the Industrial Court a wide discretion to exercise its interpretation function. She refers to the case of *Scrutiny Printers (M) Sdn Bhd v Printing Industry Employees Union* [1977] 3 CLJ 538.

[17] It was also argued by Cik Netto that it was relevant that the first respondent in exercising its interpretative function to determine the two specific questions raised by the second respondent in Form M, to ask itself the question of whether Mohamad Kassim has exercised his option to retire or resign so as to make its decision under s 33(1) of the IRA because from the facts disclosed from the documents in the said bundle of pleadings it became apparent that the letter of termination tendered by the employee was to be with immediate effect. Therefore in these circumstances, the court had to determine the question based on law and fact what were the true intentions of the parties at the time of signing the collective agreement, and as to whether there should be a notice period to be given when an employee chooses to terminate his employment and claim his retirement benefits.

[18] In addition to that learned counsel for the scond rspondent argued that the frst rspondent did not seem to have exercised its jurisdiction under s 56 of the IRA, and its enforcement function under s 56 sub-s(2) of the IRA because right from the beginning, the second respondent had not been able to establish a breach by the company or its failure to observe cl 15 of the said collective agreement and proof of non-compliance of the cl 15 of the said collective agreement is a condition precedent to the exercise of the enforcement powers contained in sub-s (2) of the IRA. Thus, the second respondent had to apply to keep its complaint for non-compliance under s 56 of the IRA in abeyance and filed application for interpretation under s 33 of the Act because in essence what was in dispute was the meaning of the expression 'Retirement at the age of 55 years or at the optional age of 45years' under cl 15 of the said collective agreement. Therefore the second respondent could not bring its case under s 56 of the Act and but to seek the interpretative function of the Industrial Court under s 33(1) of the Act.

[19] It was also contended by the learned counsel for the second respondent that the first respondent made no error of law when in dealing with a matter of interpretation it had exercised its enforcement function. Learned counsel refers to the Court of Appeal case of *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317 where Gopal Sri Ram JCA states at p 352:

> Indeed, that dissent correctly recognizes that s 33(1) and 56 cannot be treated as being housed in watertight compartments with no permissible overlap under any circumstances.

[20] On this point, I take note that the Industrial Court Chairman did not state specifically that there has been non-compliance of the award. However, where the Industrial Court goes into the question of fact to determine if the second respondent had exercised his option to retire or resign, this would tantamount to the Industrial Court's dwelling to determine whether there has been non-compliance of the award.

[21] I am inclined to agree with the learned counsel for the applicant that under s 33(1) of the IRA, the duty of the Industrial Court is merely to interpret the wording of the relevant clause of the collective agreement. The Industrial Court has no jurisdiction under that section to make a finding of fact that would be a relevant question under s 56 of the IRA.

[22] As to the case of *Syarikat Kenderaan Melayu Kelantan Bhd* to support its contention that the Industrial Court may cross its legal boundaries under s 33(1) of the IRA, a scrutiny of the case reflected that there was an argument as to whether the Industrial Court had the power to render an interpretation whilst conducting a matter under s 56. In that case, the Court of Appeal held there may be circumstances where the court may in fact interpret an award or collective agreement when deciding it there had been non-compliance. The said case did not state that the court may order compliance or arrive at a judgment that have the effect of ordering compliance whilst rendering an interpretation under s 33(1). I am of the opinion that s 33 is indeed specific. Its purpose is to interpret and nothing more. It does not entail making a finding of fact based on disputed facts. This is what has happened in this case. The Industrial Court had indeed exceeded its jurisdiction and it therefore follows that there was an error of law.

GROUND 2

Can the Industrial Court at the hearing of the application for interpretation, decide that the letter of resignation dated 5 May 2000 sent by the employee to the company is in effect a letter exercising his option to retire and not a letter of resignation. Further, can an applicant using form M under s 33(1) of the IRA pray for a variation of the award under s 33(2) which application should use Form N

[23] Counsel for the company submitted that in addition to interpreting cl 15 of the collective agreement, the Industrial Court had also decided on the issue of non-compliance and further decided that the employee had not resigned but had taken his optional retirement. The Industrial Court had made a finding of facts which were not a relevant issue for interpretation of the award.

[24] This is clear from the passage in p 5 of the award in Kandungan 9 as follows:

> This is not the end of the matter. There is a second question. Has Mohamad Kassim exercised his option to retire or did he resign from the services of the company.
>
> Therefore the answer to the question whether the employee is entitled to retirement is yes.

[25] From the above, it is clear that the Industrial Court had acted in excess of jurisdiction when it took into account irrelevant consideration in arriving at the decision when the issue before the Court was for interpretation of the collective agreement under s 33(1) of the IRA.

[26] Further, it was submitted that the second respondent had applied for an interpretation under s 33(1) of the IRA using form M. But the second respondent had during the hearing of the interpretation under s 33(1) prayed for variation of the award. This was not open to the second respondent as such a prayer can only be made under s 33(2).

[27] Pertaining to this ground, learned counsel for the second respondent argued that the second respondent had correctly used Form M to apply to

A the Industrial Court, invoking the jurisdiction of the first respondent to exercise its interpretative function under s 33(1) of the IRA to interpret the meaning of the expression 'Retirement at the age of 55 years or at the optional age of 45 years' under cl 15.3.1 of the said collective agreement. She further submitted that what the company was seeking was to challenge the wider jurisdiction (as opposed to the threshold jurisdiction) of the first respondent on the basis that it had heard an application in which the wrong form had been lodged violating rr 14 and 15 of the Industrial Court Rules 1967 ('the Rules'). What the company should have done was to seek an order of prohibition against the Industrial Court from entertaining the dispute on the ground that the latter had no jurisdiction to make adjudication. However, this was not done by the company.

[28] From the submission put forward, it is clear that by right when the second respondent applied for a variation they should have used form N instead of form M as rr 14 & 15 of the Rules do specify the kind of form to be lodged. As to the letter of resignation dated 5 May 2000 sent by the employee, it is not for the Industrial Court Chairman at the interpretation stage to decide whether that letter was in effect a letter exercising his option to retire and not a letter of resignation.

[29] Therefore, the Industrial Court had acted in excess of its jurisdiction when it touched irrelevant consideration in arriving at that decision.

GROUND 3

Did the Industrial Court made a jurisdictional error when it held that the employee was 54 years 11 months when he tendered his resignation whereas in truth the employee was 53 years 11 months.

[30] Learned counsel for the applicant contends that the employee through the union had filed Form M together with Appendix A attached. In the Appendix A, the Union has clearly stated at para 2 as follows:

> 2 And whereas an employee named Mohd Kassim bin Sheikh Adam retired on 5May 2000 at the age of 53 years 11 months and 11 days.

[31] Therefore, it is clear from Appendix A, the employee is 53 years old and not 54 years as stated by the Industrial Court Chairman in its award which states:

> A member of the Union as employee of the Company by the name of Mohd Kassim bin Sheikh Adam aged 54 years 11 months on 5.5.2000.

[32] As such the applicant submits that in the event that the employee is truly 54 years and 11 months when the employee tendered resignation then perhaps the court may award in accordance with equity and good nuisance in arriving at the decision. But in the case, the employee was 53 years old and 11 months and by tendering his letter of resignation, the employee is not entitled to any retirement benefit. Thus by the finding of facts that the employee is 54 years 11 months by the Industrial Court, it has committed a jurisdictional error. Learned counsel thereon quoted from the passage in the

case of *Guardian Royal Exchange Assurance (M) Bhd v National Union of Commercial Workers & Anor* [2000] 7 MLJ 503 wherein Faiza Thamby Chik J states:

> In *Malayan Banking Bhd vs Association of Bank Officers, Peninsular Malaysia & Anor* [1988] 3 MLJ 204, at p 206, the Supreme Court cited the case of *Secretary of State for Education and Science v Tameside Metroplita Borough Council* [1977] AC 1014 where Lord Wilberforce said that an official exercising a discretionary power commits a jurisdictional error if she or he acts upon an incorrect basis of fact. In this regard, I am of the view that the Industrial Court has acted in error of law and in excess of jurisdiction when it rendered its award on what was clearly an incorrect basis of fact.

[33] On this point, learned counsel for the second respondent however argued that it is trite law that the High Court has no power in certiorari proceedings to interfere with a finding of fact by the Industrial Court and the authority cited in the case of *Colgate Palmolive (M) Sdn Bhd v Yap Kok Foong and another appeal* [2001] 4 MLJ 97.

[34] Whilst I am fully conscious of this principle, however I am of the opinion that the finding of the Industrial Court that the employee was 54 years 11 months is clearly an incorrect basis of fact and he has committed an error of law which requires interference from this court.

GROUND 4

Can the Industrial Court at the hearing of the application for interpretation decide that the employee is entitled to receive the retirement benefits when clearly the employee has tendered his resignation to the company

[35] Pertaining to this, leading counsel for the company submits that the Industrial Court Chairman has held that:

> That is not the end of the matter. There is a second question. Has Mohd Kassim exercised his option to retire or did he resign from the service of the company? … …
>
> Therefore the answer to the question whether the employee is entitled to retirement benefit is yes.

[36] From this extract, the learned counsel for the company submits that the Industrial Court Chairman had gone beyond its jurisdiction by interpreting and deciding on the fact that the employee is entitled to receive the retirement benefit.

[37] Counsel for the second respondent on the other hand submits that the company had not brought any proof that is overwhelming to show that the first respondent had reached it decision unreasonably.

[38] In relation to this heading, I am of the opinion that the Industrial Court had gone beyond its jurisdiction by interpreting and deciding on the fact. From the award, it seems to me that the Industrial Court Chairman has encroached into the bounds of non-compliance under s 56(1) of the IRA which relates to non-compliance of any term of any collective agreement.

[39] The Industrial Court Chairman in his award had stated as below:

> The Court cannot easily allow the company to avoid paying the retirement benefits for which the employee had worked on technicalities and legal form.

GROUND 5

Industrial Court in arriving at the decision had failed to take into account the following relevant factors

[40] Under this heading, learned counsel for the company submits that the Industrial Court Chairman had failed to consider the employee had failed to renew his driving license as required under the contract of employment between him and the company and this was a breach of the material term of the contract of employment. The company had the right to terminate the employee under s 13(2) of the Employment Act 1955. By failing to take this into consideration, the Industrial Court Chairman had acted erroneously. Counsel for the second respondent however submits that these grounds did not appear in any of the statement of reply of the company which constitute the pleadings and that it is trite law that parties are bound by their pleadings. The learned counsel for the company however did not reply to this line of contention.

[41] Based on all the arguments put forward before me and bearing in mind the principles enunciated in the case of *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, I am of the opinion that the Industrial Court erred in arriving at its decision and acted outside its jurisdiction. As such, the above grounds would be sufficient to quash the award and I hereby make an order in term of all the prayers in (1) (2) and (3).

Order accordingly.

Reported by Ashgar Ali Ali Mohamed